THE LAW AND ITS LIMITATIONS.

IT is generally agreed that the functions of government are three: legislative, judicial, and executive.[1] And it is often assumed that it is the part of the executive to execute the law. As a matter of fact, however, the great bulk of the law in the United States, so far as its forcible execution is concerned, is executed by sheriffs and their deputies, or other similar officers, who take their orders directly from the courts and are responsible to them.[2] And the courts, in the exercise of their judicial function, issue these orders with reference to each particular case without consulting the executive department of the government. It is true that many writs read like orders from the chief executive to an inferior officer,[3] but this is merely a fiction due to the assumption aforesaid. *De facto*, the orders come from the courts; that is, from the judicial, not the executive department. As Mr. Justice Holmes has put it, "the *command* of the public force is intrusted to the judges in certain cases."[4] The law, therefore, may be described as substantially those rules which are used by the courts in determining when and to what extent the public force shall be used against individuals in time of peace,[5] — the government being sued by its own citizens by its own consent and not as a matter of law.[6]

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[1] In the convention which framed the Constitution of the United States the first resolution was that "a national government ought to be established, consisting of a supreme legislative, judiciary, and executive." Journal of the Federal Convention, 82, 83, May 30, 1787.

[2] It seems to be the other way in France, where the persons who actually execute the law really belong to the executive department, and for mistakes in execution are responsible, not to the courts, but to their executive superiors, under a *droit administratif* which has no counterpart in the United States.

[3] The writs in the Federal courts, for instance, read like an order from the President of the United States.

[4] Mr. Justice Holmes, The Path of the Law, HARVARD LAW REVIEW, x. 457.

[5] "The thing to remember is that *coercion by the State* is the essential quality of the law, distinguishing it from morality or ethics." John F. Dillon, LL.D., The Laws and Jurisprudence of England and America, 12.

[6] "It is a fundamental principle of our jurisprudence that the Commonwealth cannot be impleaded in its own courts except by its own consent clearly manifested by act of the legislature." Op. of Mr. Chief Justice Gray, in T. & G. R. R. Co. *v.* Commonwealth, 127 Mass. 43.

From the point of view of an individual, a collision with the public force is obviously a serious matter. Consequently, most individuals try to avoid one and govern their conduct accordingly; and thereupon the rules which determine the use of the sheriff have at once the effect of rules of conduct for individuals.[1] There are, of course, exceptional cases. The Fugitive Slave Law[2] could hardly have been described as a rule of conduct in Massachusetts, because most Massachusetts people preferred to risk a visit from the sheriff rather than return fugitive slaves. Other deplorable instances will occur to the reader. It is sufficient here to observe that they are rare. Most people make most of their conduct conform to most of the law. It is accordingly substantially, although not perfectly, correct to describe the law as a body of rules of conduct for individuals, just as we describe a diamond as a precious stone; that is, not by describing the thing itself, but rather by describing its effect on us, and our consequent attitude towards it.

There is, however, in this description, besides the slight margin of inaccuracy already stated, a further difficulty, or more correctly speaking, a need of further explanation. Such a description tends to imply that the law, in so far as it is a set of rules of conduct, is a single set of rules; and this is not true. The orders for the use of the public force are given by the judges. Consequently, the rules by which a judge decides whether he will or will not order the sheriff to act in any given case are for him, in the exercise of his judicial function, rules of conduct, pure and simple. They are the rules by which he decides what he will do. Consequently, the law is not a single set, but a double set, of rules of conduct. It is primarily a set of rules of conduct for judges in the exercise of their judicial function. It is, secondarily, in its effect, a set of

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[1] Most definitions of the law assume that the law is primarily a rule of conduct. Blackstone, for instance, following Hobbs, defines municipal law as "a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong." 1 Bl. Comm. 44. But so far as the writer knows, no such definition of the law has been generally accepted as satisfactory. See remarks of Judge Dillon in "Laws and Jurisprudence of England and America," page 9. Furthermore, Blackstone himself says that "all jurisdiction implies superiority of power. . . . And if the prince gives the subject leave to enter an action against him . . . in his own courts, the action itself proceeds rather upon natural equity than upon municipal laws. For the end of such action is not to compel the prince . . . but to persuade him." 1 Bl. Comm. 242, 243. See also the remarks of Mr. Justice Holmes, HARVARD LAW REVIEW, x. 462: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else."

[2] Acts of the 31st Cong. 1st Sess. Chap. LX., approved Sept. 18, 1850.

rules of conduct for individuals. In either aspect, as rules of conduct it must look for its ultimate justification to all those considerations based on morality by which conduct is regularly tested. Only in any particular case the conduct of the judge may be subject to one set of considerations, and the conduct of the parties to an entirely different set. For instance, how far a judge ought to interfere in trouble between members of the same family is one question. How a man ought to treat his wife is another question. Consequently, between conduct becoming a gentleman, on the one hand, and, on the other, conduct so gross that a divorce court will interfere, is a middle ground, including various degrees of brutality that may be technically within a man's "rights." But it does not follow from this that it is right for him to behave like a blackguard. Conclusions drawn with reference to the conduct of the judge are not to be transferred either consciously or unconsciously to premises referring to the conduct of the parties. It is only by keeping these two positions separate, drawing separate conclusions from each point of view, comparing these conclusions, and confining the law to the extent to which they overlap, — it is only in this way that the law, so far as it goes, can be kept in accord with morals, justifying its nomenclature borrowed from morals, and at the same time the liberty of the citizens, including the freedom, in many cases, to make mistakes and suffer their natural consequences, can be preserved. All those conclusions drawn from one point of view, and not covered by conclusions drawn from the other point of view also, are not properly within the law. For instance, from the point of view of the individual a man should not covet his neighbor's goods. But from the point of view of the judge a court ought not to give orders in matters of which it cannot be reasonably certain. And it cannot be reasonably certain of what goes on in other men's minds, there being no such thing as general telepathy. Consequently, the passion of covetousness is not properly within the law, and the law is confined to what theologians call external morality.[1] This is undoubtedly a limitation from one point of view. But because we naturally refer limitations to the subject-matter of our inquiry rather than to the point of view from which we regard it, especially if that point of view is a more or less unconscious one, we often speak of such instances as limitations of

[1] Sir Frederick Pollock, Justice according to Law, HARVARD LAW REVIEW, ix. 303.

the law. Whereas, what we should do in such a case is to speak of the law as limited individual morals. All those rules, such as the Statute of Limitations, the Statute of Frauds, and the Insolvency Acts, rules that owe their existence and look for their justification not to what individuals ought to do, but to what judges ought not to make them do, are instances of this kind of limitation.

Let us now turn, by way of comparison, to a limitation of the law in the strict sense of the phrase, — a limitation of the law itself. The law is generally studied as a science. But the practical expression of it is by the judges in the actual decision of cases,[1] and this is not a science at all, but an art. It is, indeed, always an art to give practical expression to anything, and it is just as truly an art to decide cases by a rational ascertainment of rules and their rational application, as it is to decide any other sort of question, medical, military, or æsthetic. Furthermore, every art has its own peculiarities and their consequent limitations, and the art of deciding cases at common law is no exception.

A decision at common law differs from a decision in any other profession in its quality as a precedent. A surgeon, for example, in deciding between an aneurism and an abscess, knows that his decision will be justified alone by the result. If he is right, the reasons for his decisions are of secondary importance. If he is wrong, if he opens an aneurism, mistaking it for an abscess, and the patient dies on the table, his reasons are at best an excuse. But it is not so in the law. A judge generally feels bound to follow some previous decision, and shrinks from carrying his own any further than he can teach it. The judgment in Dumpor's Case,[2] for example, may have worked admirable justice between the parties. It may have been very unfair in the lessors in that case to insist on the clause in their lease against assigning, after having sanctioned an "absolute" assignment "*quibus cumque*" which the parties may have understood to mean "anyhow" as well as "to anybody." But that is not the reason given by the court for its judgment. And when no one understands the reasons that are given, when Lord Eldon says that it has always struck him as extraordinary,[3] and Sir James Mansfield says that the profession have always wondered at it,[4] the case is, professionally speaking, a fail-

[1] Advisory opinions of the justices, even when constitutionally required, are not part of the law. Green *v.* Comm., 12 All. 155, 164.

[2] 4 Co. 119 b.

[3] Op., Brummel *v.* McPherson, 14 Ves. Jr. 173.

[4] Op., Doe *v.* Bliss, 4 Taunt. 735.

ure. The result is that, while in all other professions the half of art may be taught, but the artist needs the whole, the art of deciding cases at common law is limited to that part which can be taught. What the judge or the lawyer cannot explain to some one else, he has very little use for. Every one has heard of the dryness of the law, and this is what the expression means. The lawyer instinctively limits his point of view and his mental processes to those that are transferable, to those that he can explain and teach to some one else. It may perhaps be suggested that all reasoning is transferable so that another can understand it. But if the intellectual ability to deal with new data is taken as the test for reasoning, this is very far from true. Reasoning in this sense has two steps: first, sagacity, or the ability to pick out the important facts which generally constitute the minor premise of the syllogism; and second, learning, that is, the ability to recall readily all the known consequences, concomitants, and implications from those facts which generally constitute the major premise.[1] The first step is the more difficult one. It is the part that requires insight; it is the part that cannot be taught. Take, for instance, a decision in another profession. On the third day at Gettysburg, General Hunt, the Federal Chief of Artillery, came to the conclusion that the Confederate cannonade was intended to produce a reply from the Union guns until their ammunition was exhausted, prior to an advance of the Confederate infantry in force. He accordingly applied to headquarters for permission to cease firing, that he might reserve the Union ammunition.[2] The correctness of his decision is now a matter of history. The major premise, the rule that when the enemy is trying to exhaust your ammunition, you must reserve it, is something that any man could learn. The minor premise, the fact that the enemy was then and there trying to exhaust the Federal ammunition, was a fact to be picked out from all the perplexing incidents of a great battle, — a fact that could not be taught, and that at least one corps commander on that day failed to realize.[3]

Suppose, now, for a moment, that General Hunt, when he went to headquarters, instead of going as a soldier to a soldier who knew how to value a soldier's opinion, had felt the burden on him

[1] James, Psychology, pp. 353 *et seq.*

[2] Battles and Leaders of the Civil War, Vol. III. pp. 372–374.

[3] Hazards' batteries (the artillery of the Second Corps), acting under instructions from their corps commander, had exhausted their long-range projectiles before the Confederate infantry began to advance, and with the exception of a few shots were silent until the infantry was within canister range. Ib. 375.

to establish his position by evidence that would appeal, not to his mind, but to the mind of some one else. What would have become of his decision in that case? Could he have fully explained, even to himself, much less to anybody else, precisely why he thought as he did? He was a personal friend of a gentleman on the other side, and they had studied the uses of artillery together before the war. Could he have explained, even to himself, the precise extent to which the result of this intimacy influenced his decision, or of half a dozen other similar considerations? And yet no one doubts that the value of a decision in any other profession except the law lies in just such considerations as these, — considerations that a lawyer necessarily disregards. Evidence that appeals to his mind alone is for him useless. His work deals with what is transferable, — with what he can explain and teach to some one else. His highest title is Learned. The rest of the work, the part where sagacity and insight are required, he turns over to the jury. And the line between the functions of the court and those of the jury follows very closely the line dividing matter decided by learning, from matter decided by sagacity. It is often said that the court decides matters of law; but the court also decides all those questions of fact which require uniformity, that is, all those matters where a decision in one case can be readily made by following a decision in a previous case.[1] On the other hand, where there is no opportunity for precedent or learning, the questions are left to the jury, — questions of law as well as of fact. In a suit for negligence every single thing that every person, in any way connected with the accident, did, may be known and undisputed, and the case may be reduced to a question of conduct, pure and simple. But if the accident occurred in the management of some new machine or some new enterprise, or when the circumstances are so complicated as to present a new situation, "even if the facts are undisputed, the question whether either or both of the parties were at fault is for the jury."[2]

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[1] Prof. J. B. Thayer, Law and Fact in Jury Trials, HARVARD LAW REVIEW, iv. 159–161.

[2] Kerrigan *v.* West End St. Ry. Co., 158 Mass. 305. How far the repugnance to new facts is characteristic of lawyers learned in systems other than the common law may perhaps be doubted. The reader will at once recall Lord Mansfield's delicate scorn when he observed that the Roman tribunals at once, and the English at last, decided according to the undisputed intent of the testator, which was manifest on the face of the will, and yet not categorically set down in words. Op. in Frogmorton *v.* Holliday, 3 Burr. 1618, 1624.

Many instances of the effect of this devotion to precedent will occur to the reader, the inferior nomenclature of the law being perhaps the most common.[1] But there is one instance so striking that I think it worth while to mention it at length. Before the case of Priestly *v.* Fowler,[2] there was a rule of conduct, known now as the fellow-servant rule, so regularly observed that the courts had never had occasion to pass on it. A servant simply never thought of suing his master for injuries caused by the negligence of a fellow servant. Priestly *v.* Fowler was decided in 1837. A little before this time machinery had made its appearance as a factor in civilization, and business corporations were formed to put it in general use. There then grew up a class of persons employed in operating this machinery and earning dividends for these corporations, a class now called employees,[3] which had not before existed. They were as different from servants as servants were from soldiers. The servant occupied a close personal relation towards his master, ministering to his master's wants and doing his master's bidding, and fighting in his defence, if necessary.[4] A son could not do much more,[5] and a loss of service meant the loss of much that a son might do for his father.[6] In short, the relation was that of a status, and the servant owed his master a certain allegiance. To kill his master was more than murder, it was petit treason.[7] This close personal relationship gave the conception of a servant a dignity that made it at once suited to polite society and applicable to the highest relations. If you accepted a challenge, you stated that you were very much at the gentlemen's service. If you received a formal communication, you were informed at the end of it that the writer had the honor to be your

[1] "The ambiguity in the meaning of terms, which is perhaps the chief reproach of our law. . . ." Gray, The Rule against Perpetuities, page iv.

[2] 3 M. & W. 1.

[3] According to Murray's Dictionary, "employé" first appeared in English in 1834, and was used by John Stuart Mill in 1848. "Employee" first appeared in America in 1854.

[4] A servant could justify an assault in defence of his master. 2 Roll. Abr. 546.

[5] Blackstone describes the duties of a child as "subjection and obedience" during minority. 1 Bl. Comm. 453.

[6] An action for loss of service was (and is) the only remedy by which a parent could recover for injuries to a child. Grinnell *v.* Wells, 7 M. & Gr. 1033, 1041.

[7] "And petit treason doth presuppose a trust and obedience in the offender, either civil, as in the case of a wife or servant, or ecclesiastical. . . ." Coke, 3d Ins. 20. "If a child live with his father as a servant," to kill his father was petit treason, but not otherwise. 1 Hale P. C. 380. It was petit treason to kill a former master from a grudge taken during the time of service. Ib.

very obedient servant. If you fought for your King, you were in his service; if you worked for him at home, you were still in his service. The King himself could be no more than a servant of his Lord and Master, the Redeemer. The worship of the Deity was Divine service. And the worshippers felt no incongruity between referring to themselves as "we, Thine unworthy servants," and to the Deity as "Our Father." Now strike out everything personal from the conception of a servant, everything that leads him to feel that he is doing something for somebody else, and what is left is the employee. There is not a single noble use of the word "servant" or "service," for which "employee" or "employment" could be substituted. It is not surprising, therefore, that employees at once acted differently from servants, and began suing their employers, both in England and America, for injuries caused by the negligence of co-employees.[1] The courts, however, were devoted to precedent. They were the legitimate product of the view that somewhere or other, "*in nubibus* or *in gremio magistratuum*, there existed a complete, coherent, symmetrical body of English law of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."[2] As a matter of course they looked for precedent; and almost as a matter of course they applied to employees the recognized principles applicable to servants, because servants were more nearly like employees than any other class of persons. But they were not just like employees. A true servant owed his master an allegiance that was not due to any mere contract. No contract could put a servant and a son on substantially the same footing, or make the murder of a master petit treason. The employee, on the other hand, was entirely a creation of contract, and the courts, in introducing a term into that contract, whether as to suing for

[1] Murray *v.* S. C. R. R. Co., 1 McMullan, 355 (railway employee, South Carolina, 1841); Farwell *v.* B. & W. R. R. Co., 9 Met. 49 (railway employee, Massachusetts, 1842); Hutchinson *v.* York, Newcastle, & Berwick Ry. Co., 5 Ex. 343 (railway employee, England, 1850); Bartonshill Coal Co. *v.* Reid, 3 McQ. 266 (miner, Scotland, 1856).

Priestley *v.* Fowler, 3 M. & W. 1, presented the fellow-servant question rather by the pleadings than by the facts. The evidence relied on showed that the accident was due to the negligence of the master himself. After a verdict on this evidence for the plaintiff, the defendant made a motion in arrest of judgment for insufficiency of the declaration which set forth the negligence of a fellow servant; and prevailed. Sword *v.* Cameron, 1 Scotch Sess. Cas., 2d series, 493, 1839, seems also to have contained much evidence of the master's negligence.

[2] Sir Henry Maine, Ancient Law, 31.

injuries caused by the negligence of co-employees, or as to any other matter, were inevitably acting on one side of the bargain or on the other. When, therefore, the courts "implied" a term that the master should not be liable, there was only one thing left for the employee to do; that was to get the legislature to invent a term on the other side. The result was the English Employers' Liability Act, of 1880, which was followed in Alabama in 1885, in Massachusetts in 1887,[1] and later in other States.

Not the least interesting part of these acts are the clauses restricting them from having any application to real servants. What the courts confounded, the legislature was able to keep separate. The result is that the fellow-servant rule is in precisely the same position to-day as it was at the beginning of the century.

G. Hay.

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[1] 43 & 44 Vict. ch. 42; Ala. Code, 1886, pars. 2590–2592; Mass. Acts of 1887, ch. 270.